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UNITED STATES DISTRICT COURT
Northern District of California
Oakland Division

11 DEXTER DALE, No. C 05-01842 JSW (LB)
12 Plaintiff,
13 v.
14 **ORDER RE 3/8/2012 JOINT
DISCOVERY LETTER**
L. FERNANDEZ, *et al.*, [ECF No. 72]
Defendants.

I. INTRODUCTION

On March 3, 2012, Plaintiff Dexter Dale and Defendants Fernandez and Lough filed a joint discovery letter in which they detailed three disputes: (1) whether Defendants' counsel agreed to accept service of a subpoena for deposition testimony and production of documents from the Correctional Training Facility in Soledad, California ("CTF"); (2) whether Defendants' counsel had a duty to preserve documents related to CTF's medical policies in 2003; and (3) whether Defendants' counsel must review Defendants' personnel records for documents responsive to Plaintiff's requests for production of documents. 3/8/2012 Joint Discovery Letter, ECF No. 72 at 2.¹ On March 9, 2012, the district referred the above-captioned matter to the undersigned. Referral Order, ECF No. 73 at 1. Because the joint discovery letter comports with the undersigned's procedures regarding discovery disputes, the court considers the letters and addresses the disputes.

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronic page number at the top of the document, not the pages at the bottom.

1 After reviewing the issues, the court finds in favor of Plaintiff.

2 **II. DISCUSSION**

3 **A. Whether Defendants' Counsel Agreed to Accept Service of a Subpoena for Deposition**

4 **Testimony and Production of Documents from CTF**

5 The parties dispute whether Defendants' counsel Kay Yu agreed to accept service of a subpoena
6 for Rule 30(b)(6) deposition testimony and production of documents from CTF. 3/8/2012 Joint
7 Discovery Letter, ECF No. 72 at 2.

8 Plaintiff argues that, on January 25, 2012, Defendants' counsel Kay Yu agreed to accept service
9 of a subpoena for the deposition of a Federal Rule of Civil Procedure 30(b)(6) ("Rule 30(b)(6)")
10 witness for CTF and the production of documents on February 24, 2012. *Id.* Plaintiff observes that,
11 upon receipt of the subpoena on January 25, Defendants' counsel did not object to the request for
12 production of documents contained in the subpoena nor did she read the subpoena and the
13 attachments until much later. *Id.* Defendant's counsel also identified Dr. Friedricks as CTF's Rule
14 30(b)(6) witness and communicated that she would be representing him at the deposition. *Id.*
15 Plaintiff argues that the court should follow the reasoning in *McNally Tunneling Corp. v. City of*
16 *Evanston*, No. 00C6979, 2002 WL 59115, at *3 (N.D. Ill. Jan. 14, 2002), in which the court found
17 that the plaintiff's counsel had agreed to accept service of the supplemental subpoena where the
18 counsel had accepted service of a deposition subpoena and was later served with a supplemental
19 subpoena that called for the production of documents. *Id.* at 3.

20 Plaintiff also notes that Defendants cite no authority for the proposition that the California
21 Department of Corrections and Rehabilitation ("CDCR") is immune from service of subpoenas in a
22 civil case. *Id.* And Plaintiff discusses *Allen v. Woodford*, 544 F. Supp. 2d 1074 (E.D. Cal. 2008), in
23 which the court held that "the Eleventh Amendment does not apply to preclude discovery from a
24 State agency, which can only be obtained through the State's custodians of records or from other
25 employees having custody and control of the information or documents sought." *Id.* at 3-4 (quoting
26 *Allen*, 544 F. Supp. 2d at 1079; also citing *Todd v. Lamarque*, No. C03-3995 SBA (BZ), 2007 WL
27 3151627, at *1 (N.D. Cal. Oct. 26, 2007) (denying motion to quash subpoena issued to CDCR for
28 production of documents)).

1 Defendants view *McNally Tunneling Corp.* as distinguishable because the subpoena in that case
2 was served upon the attorney of a party to the action. *Id.* at 3. Defendant argues that, in *McNally*
3 *Tunneling Corp.*, the subpoena sought documents that the deponent, plaintiff's expert witness, had
4 relied upon in forming his expert opinion. *Id.* Here, CTF is not a party. *Id.*

5 Defendants also maintain that the subpoena is invalid because CTF, as an agency of the CDCR
6 enjoys sovereign immunity pursuant to the Eleventh Amendment. *Id.* According to Defendants, this
7 immunity can only be specifically waived. *Id.* With reference to the deposition subpoena,
8 Defendants' counsel specifically waived this immunity in her e-mail but no such waiver was given
9 with respect to the production of documents. *Id.*

10 First, the court finds that Defendants' counsel accepted service of the subpoena. Defendants
11 point out factual differences from *McNally Tunneling Corp.* but does not explain why these
12 differences are material.

13 Second, as to the sovereign immunity issue, the court is persuaded by the reasoning in *Allen*.
14 The court in *Allen* observed that a third-party discovery request is not a suit, which are understood to
15 be the prosecution, or pursuit, of some claim, demand, or request. 544 F. Supp. 2d at 1078. The
16 *Allen* court also noted that the sovereign immunity of states prohibits plaintiffs from bringing suits
17 where the judgment sought would expend itself on the public treasury or domain or interfere with
18 the public administration. *Id.* Following the reasoning in *Allen*, the court holds that CTF may not
19 refuse to respond to Plaintiff's subpoena for the production of documents based on an assertion of
20 sovereign immunity.

21 **B. Whether Defendants' Counsel had a Duty to Preserve Memos and Policies Regarding**
22 **Medical Care at CTF in 2003.**

23 The parties also dispute whether Defendants' counsel had a duty to preserve memos and policies
24 regarding medical care at CTF in 2003. 3/8/2012 Joint Discovery Letter, ECF No. 72 at 4.

25 On March 6, Defendants' counsel Plaintiff that memos and policies regarding medical care at
26 CTF in 2003 had been destroyed pursuant to CDCR's five year document retention policy. 3/8/2012
27 Joint Discovery Letter, ECF No. 72 at 4.

28 Plaintiff argues that Defendants' counsel had a duty to preserve those documents – even absent a

1 discovery request for them – because they were highly relevant to Plaintiff’s claims, which were
2 first filed in 2003, several years before the documents would have been destroyed pursuant to
3 CDCR’s document retention policies. *Id.* Plaintiff notes that his original complaint characterized
4 Defendants’ conduct as negligent. *Id.* at n.1.

5 Defendants argue that Plaintiff could have made a specific request to CDCR to retain the
6 relevant memos and policies but did not do so. *Id.* Defendants also argue that the memos and
7 policies did not become relevant to this action until Plaintiff amended his complaint this year
8 because a section 1983 claim does not need or require the discovery that Plaintiff is seeking
9 presently, as such a claim only requires the factual circumstances and the state of mind of the
10 defendant. *Id.*

11 Here, it is unclear what is actually at issue. If Plaintiff intends to seek sanctions for spoliation
12 (as is indicated in the joint letter), he must follow the procedures set forth in this district’s local
13 rules. *See N.D. Cal. Civ. L. R. 7-8.*

14 To the extent that the parties are seeking guidance for the future, the court first notes that a
15 failure to comply with a government policy generally cannot, by itself, be used to establish a
16 constitutional violation. *See generally United States v. Goodwin*, 57 F.3d 815, 818 (9th Cir. 1995)
17 (holding “[t]he failure of the AUSA to comply with internal department policy does not, without
18 more, establish a deprivation of [the defendant’s] constitutional rights.”). But, this does not mean
19 that the policies might not be relevant and probative. *See Cotton v. City of Eureka, Cal.*, No. C
20 08-04386 SBA, 2010 WL 5154945, at *18-*19 (N.D. Cal. Dec. 14, 2010) (discussing the admission
21 of government policies in a section 1983 deliberate indifference case). And, in this case, the policies
22 and memos might help Plaintiff establish that Defendants were aware that a substantial risk of
23 serious harm existed.

24 Additionally, as the parties seem to acknowledge, after Plaintiff put Defendant on notice of his
25 (potential) negligence claims, the policies’ relevance is clear. For example, in a related context, the
26 California Supreme Court held that “the provisions of the CHP Officer Safety Manual may not
27 properly be viewed as establishing the applicable standard of care, but they may be considered by
28 the trier of fact in determining whether or not an officer was negligent in a particular case.” *Lugtu*

¹ *v. California Highway Patrol*, 26 Cal.4th 703, 720 (Cal. 2001). This principle applies to the instant case with regard to the relevance of the policies regarding medical care at CTF.

3 C. Whether Defendants' Counsel Must Review Defendants' Personnel Files for Responsive
4 Information

Finally, the parties disagree about whether Defendants' counsel must review Defendants' personnel files for responsive information and produce anything relevant. 3/8/2012 Joint Discovery Letter, ECF No. 72 at 5.

8 Plaintiff's Requests for Production Numbers 13 and 15 seek information that may be
9 contained, at least in part, in Defendants' personnel files regarding complaints filed against
10 Defendants by other inmates and any investigations into those complaints. *Id.* Defendants' counsel
11 has not reviewed Defendants' personnel files pursuant to Plaintiff's discovery requests and refuses
12 to do so. *Id.* Defendants argue that their counsel does not need to search the personnel files because
13 they have stated in their interrogatories that they have never been disciplined and, according to
14 Defendants' counsel's belief based on her experience in another case that involved employees *at a*
15 *different prison*, the personnel files would only contain complaints that resulted in disciplinary
16 action. *Id.*

17 Plaintiff counters that there is no privacy protection that shields all personnel files from
18 discovery and that he is not convinced that the types of documents kept in the personnel file of an
19 employee at Salinas Valley Prison are the same as the types of documents retained in the files of
20 employees at CTF. *Id.*

21 Defendants' counsel must review the files. Defendants do not argue that it is burdensome, make
22 no showing that it is privileged, and do not dispute that the information sought is relevant.
23 Moreover, Defendants provide no facts, law, or analysis that suggests that CTF and Salinas Valley
24 Prison maintain their files in the same fashion (and that would not alter the court's analysis anyway).

III. CONCLUSION

26 For the foregoing reasons, the court **FINDS** that (1) Defendants' counsel agreed to accept
27 service of a subpoena for deposition testimony and production of documents from CTF; (2)
28 Defendants' counsel had a duty to preserve documents related to CTF's medical policies in 2003;

1 and (3) Defendants' counsel must review Defendants' personnel records for documents responsive
2 to Plaintiff's requests for production of documents.

3 This disposes of ECF No. 72.

4 **IT IS SO ORDERED.**

5 Dated: March 26, 2012


6 LAUREL BEELER
7 United States Magistrate Judge
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